IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

L.P.A.No. 63 of 2004

in

Writ Petition No.2606 of 200l

Shri Mohammed Ayubyuddin Malik
BMC Building No C/3 Room no.5
Raoli Camp Fire Station
Sardar Nagar No.4
Sion Koliwada,
Mumbai 400037. ... Appellant

vs

l. The Municipal Corporation of
Gr Mumbai
2. Municipal Commissioner
Mahapalika Bhuvan,
Mahapalika Marg, Mumbai.l
3. Shri B B Surve
Chief Fire Officer..... Respondents.

Shri A.V.Bukhari with Mr K S.Shetty for appellant
Mr. A.Y Sakhare with M D Patil for S.J.Billimoria for respondents

CORAM: A.P.SHAH &
S.U.KAMDAR JJ.
1st October 2004

ORAL JUDGMENT: (Per A.P.Shah J.)

Admit.

2. The learned counsel appearing for the respondents waive service.By consent, appeal is taken up for final hearing.

3. This appeal is directed against the order of the learned single Judge passed in Writ Petition No. 2606 of 200l dated 2.8.2002 whereby the order passed by the Industrial Court, Mumbai in Complaint (ULP)No. l442 of 200l dated 24.4.200l is stayed pending hearing and final disposal of the writ petition. Briefly the facts are that the appellant joined service in the Fire Brigade Department of Mumbai Municipal Corporation - respondent no.l as a Fire Officer in l972. In l986 he was promoted as Driver Operator. The next promotional post is that of Sub-Officer. The appellant has completed training for the post of Sub-Officer and his name is included in the list of eligible candidates at Srl No. l7. It appears that sometime in June 2000 the appellant while driving the fire engine dashed against a kerosene cart . FIR in this regard was filed at Antop Hill Police Station. The appellant

was issued a chargesheet on 7.6.2000 in connection with this incident and he was asked to appear before the Asst. Dean of Sion Hospital. According to the Corporation appellant failed to report to the Sion Hospital and therefore a second chargesheet dated 8.ll.2000 was issued alleging that he did not report to the Sion Hospital after l3.9.2000. This is disputed by the appellant contending that he had appeared before the doctor of Sion Hospital and he was referred to an Eye Specialist. It is the case of the Corporation is that the appellant's eye sight is affected considerably and therefore he is not fit to carry the job of the fire engine driver. By order dated ll.l2.2000 the appellant was reverted to the post of fireman.

4. The appellant filed Complaint (ULP) No.l442 of 2000 in the Industrial Court Mumbai inter alia seeking to quash the order of reversion and further for promotion to the post of Sub-Officer.This complaint was allowed by the Industrial Court vide order dated 24.2.200l holding that the Corporation has engaged in unfair labour practice under item no. 9 schedule 4 of the MRTU and PULP Act. The Industrial Court set aside the order of reversion dated ll.l2.2000 and further directed to promote

the appellant to the post of Sub-Officer in the vacancy caused on retirement of an officer attached to Marol Fire Station and grant him all benefits from the date of passing of the said order. This order was challenged by the Corporation in Writ Petition No. 2606 of 200l.The Writ Petition was admitted by the learned single Judge and the order of the Industrial Court was stayed pending the hearing and final disposal of the writ petition.

5. Mr Bukhari, learned counsel appearing for the appellant contended that since the appellant has acquired disability during his service, provisions of section 47 of the Persons with Disabilities Act, l995 became applicable to him and it was not open for the Corporation to revert the appellant and the Corporation was obliged to shift the appellant to some other post with same payscale and service benefits and if that was not possible the appellant should have been kept on a super numerary post until a suitable post was available for him or until he attained the age of superannuation. We find merit in the submission of Mr Bukhari. From the facts of the case it is clear and it is not disputed that the appellant’s case is covered by section 2(i)(v) read with section 2(o) of the Act. It is also not disputed that the disability was

acquired by the appellant during his service. Under section 2 "disability" and "person with disability" are separately defined and they are distinct. Section 32 deals with identification of posts which can be reserved for persons with disabilities. Section 33 speaks of reservation of such percentage of vacancies not less than 3% for persons or class of persons with disability of which l% each shall be reserved for persons suffering from blindness or low vision, hearing impairment and locomotor disability or cerebral palsy. Section 38 requires the appropriate Governments and local authorities to formulate schemes for ensuring employment of persons with disabilities. Section 47 is included in Chapter VII of the Act. Chapter VI deals with employment relating to persons with disabilities including identification of posts and reservation of vacancies for such persons. Section 47 reads as follows:

> "47. Non-discrimination in Government employment:- (l) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service;

Provided that,if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits;

Provides further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability.

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification,exempt any

establishment from the provisions of this section".

6. A bare perusal of the aforesaid section makes it abundantly clear that no establishment shall dispense with or reduce in rank an employee who acquires a disability during his service.If an employee acquires a disability after joining service and is found not suitable for the post he was holding, it is open to the employer to shift him to some other post with the same pay scale and service benefits and if it is not possible to adjust the employee against any post, then he may be kept in a supernumerary post until a suitable post is available for him or he attains the age of superannuation, whichever is earlier. The heading of the section and the Chapter in which it falls and the fact that it starts with a negative mandate leaves no room for doubt that the provision is mandatory in nature. This provision came up for consideration before the Apex court in Kunal Singh vs Union of India and anr,AIR 2003 SC l623 wherein it was observed that section 47 was plain and casts a statutory obligation on the employer to protect an employee acquiring disability during service and the provision was held to be mandatory.

7. In the instant case the appellant is in service of the Corporation since l972.The Corporation is an establishment within the meaning of clause (a) of section 2 of the Act and is, therefore, obliged to comply with the provisions of section 47 of the Act in the case of appellant. In the facts and circumstances of the case we are satisfied that the case ofthe appellant is squarely covered by section 47 of the Act and the Corporation could not dispense with his service merely because he had acquired a disability during his service. We therefore set aside the order of the learned single Judge and direct that the Corporation shall shift the appellant to some other post with the same payscale and service benefits and if that was not possible the Corporation shall create a supernumerary post until a suitable post was available for him or till he attains the age of superannuation. The Corporation shall release the differential salary of the appellant from the date of his reversion i.e. ll.l2.2000 within 8 weeks from today and pay to the appellant current salary as payable to the post of driver operator. The order of Industrial court granting promotion to the post of Sub-Officer shall however remain stayed pending the hearing and final disposal of the petition. The learned single Judge is requested to

expedite the hearing of the petition.

Appeal is accordingly disposed of.